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# Case and Comment

*The Lawyers' Magazine — Established 1894*

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Condensed from Journal of the
American Judicature Society, October, 1947

# The Survey of the Legal Profession

By HON. ARTHUR T. VANDERBILT
*Chief Justice of New Jersey*

THE IDEA OF the Survey of the Legal Profession originated in the Section of Legal Education of the American Bar Association, which through its chairman, Dean Albert J. Harno, moved the House of Delegates in 1944 for an over-all study, in the public interest, of legal education and admissions to the bar.

Further study of the project by the Council of the Section of Legal Education developed the necessity of a much broader project—the Survey of the Legal Profession—if the study of legal education was to be really worthwhile. How could one determine the proper objectives of legal education without knowing what lawyers actually do and whether they are adequately meeting the needs of the public? An adequate study of legal education inevitably involves a survey of the legal profession in the interest both of the public and of the bar. The House of Delegates quickly concurred in the larger and more ambitious project and authorized a committee to seek the financial assistance of a foundation. Early in 1947 The Carnegie Corporation of New York made a grant of $100,000 toward the Survey, conditioned on the Association's contributing $50,000 over a five-year period.

From the outset it was agreed that the scope of the Survey must be broad and that it should aim to bring all of its parts ultimately into the single focus of an integrated study. Most important of all, the Survey must be independent, not subject to review or censorship by any agency. To achieve these ends a Council was appointed, the first function of which was to select the Director. The Council has not only selected a Director who has given several months of study to the project, but it has held two meetings, one in New York and the other in Cleveland. At the latter meeting the scope and method of the Survey were tentatively determined.

How daring the project is may be better understood when it is explained that the "Statistical Abstract of the United States" just published does not even index "lawyers," though patient persistence will be rewarded by

disclosing the 1940 census figures showing the number of members of the bar. The "Statistical Abstract" is no different from the Army or Navy, which likewise failed to recognize the existence of lawyers as a separate category, though before the war was over it came to be recognized that their services in executive and consulting positions were indispensable. Likewise in "America's Resources" one may search in vain for any evidence that lawyers or legal services will play any part in the life of the average citizen over the next few years.

In sharp contrast are the studies as to the cost of medical care begun thirty years ago and continued ever since. On the basis of these studies it is possible to compute actuarial tables as to the incidence of illness and hospitalization on which have been based the Blue Cross, the White Cross and, in New York City, the Health Insurance Plan. The five engineering societies, moreover, have just published a comprehensive report, "The Engineering Profession in Transition," based on a 1946 survey of the engineering profession, with much statistical data. In the field of the law, however, it is perfectly clear that as to the primary data for the survey of the legal profession we must start from scratch and develop our own statistical material. Though we all know the important part played by lawyers in every community, we have yet to develop the supporting evidence in concrete form.

### Five Divisions of Inquiry

Much thought has been given to the scope of the Survey and, tentatively, five main divisions of inquiry have been agreed upon. The first is the professional service of the bar; next comes its public service; and third its judicial service. To achieve these three great objectives of the profession requires lawyers with high standards of competence, integrity and professional responsibility as well as with reasonable economic security. These considerations suggest the fourth and fifth topics of inquiry, namely, fourth, professional competence and integrity and, fifth, the problem of the economic security of the profession.

Without attempting to go into all of the subdivisions of the five major lines of inquiry, it will be helpful to point out the chief questions that we will seek to answer under each main head. In dealing with professional service we will seek to show objectively—what the lawyer does, who needs professional assistance, and whether these needs are being met adequately.

Under the second heading of public service, we will inquire into what public service the lawyer owes to the citizen in the protection of fundamental rights; to the courts in the selec-

tion of judges and juries, and in the administration of justice; to the legislature in the improvement of statutory law and regulations having the force of statutes; to the administration of government in such matters as personnel, policies, and procedures; and to the community, the state, and the nation in all other activities promoting the public welfare. Here we believe it will be most revealing to report the contributions made by members of the bar to all kinds of public service to an extent that is not realized by the public nor matched by any other profession.

Under the third heading of judicial service, we will consider whether the judicial system is adequate to the needs of present day life, whether the judicial processes are adequately suited to modern society and whether the facilities for judicial service are compatible with the service required in an era of rapid change.

Coming to the fourth major source of inquiry dealing with professional competence and integrity, we must ask whether the modern system of legal education prepares lawyers for their professional responsibilities. We must also find out whether good material is encouraged to enter the profession as well as whether the undesirable is weeded out. We must determine what are the proper standards of conduct and how well they are maintained. And we must note whether the profession has protected the public interest against the lay practice of the law.

Finally, in dealing with the economics of the profession, we must ascertain how the methods of professional service affect its cost to the client. We must determine whether there is a reasonable relationship between present costs and minimum necessary costs in administering the judicial process. We must see whether or not the services of lawyers are as widely availed of as they might be. And finally we must inquire as to whether the profession has given sufficient consideration to activities promoting the economic security of the bar, if it is to do its full duty with respect to its clients, and its public and judicial service. We have concluded unanimously that for the Survey to achieve its objective the study must not content itself with conditions as they exist today. To understand the trends in the profession we must study the profession historically. Nor will this alone suffice. We must know what is being done in other common law countries and also in countries which operate under systems other than the common law. We cannot afford to neglect the comparative method of study. Next, and probably most difficult of all, we must pursue the statistical approach. We must develop the pertinent data as to the financial

aspects of the profession both from the standpoint of the client and the lawyer. And because public service comprises so large a part of the activity of the members of the profession, we must also evaluate those services statistically. Finally our study must not only treat of the lawyer as an individual, but must also present his activities as a member of an organized profession, functioning through local, state and national bar associations.

Obviously a survey as extensive in scope and as broad in method as we contemplate cannot be the work of a single man or a small group of men. Accordingly, it is proposed to adapt to the work of the Survey the cooperative methods which have proved so successful in the drafting of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. The work of the Survey will be broken down into various topics and a consultant will be asked to assume the responsibility for a preliminary report on each topic. He may either work alone or, more likely, in conjunction with a group of other experts. On each topic, moreover, one or more correspondents will be appointed in each state. It will be the work of the consultant on each topic, both on his own initiative and with the aid of his confreres and the correspondents in each state, to develop all of the available material on this topic and cast it in the form of a preliminary report. This report will not only be subjected to the scrutiny of his correspondents but of all bar association committees active in the particular field and any individual lawyers who may evidence an interest therein.

As a result of the circulation of the first report prepared by each consultant, a need will doubtless be felt for a second and final report on each topic. All of these reports will become material which will be available for the use of the Director in his final study. In this way it is believed that we will have availed ourselves, as nearly as possible, of the accumulated wisdom of the profession on every phase of the Survey. But it is not proposed to stop here, for it is contemplated to seek counsel and criticism of interested and intelligent laymen. In the judicial conferences of several of the federal circuits laymen have, within the past few years, made invaluable contributions, and it is our expectation to take the utmost advantage of the interest of such citizens whose point of view cannot help but shed light on our problems.

I think from what has been said it will be very apparent that the Survey of the Legal Profession will not be the work of a few months or of a single year. Even with the utmost cooperation from all of the leaders in the profession, the project is bound

to take from two to three years, but it is believed by all who have examined into the subject that we will be the better off for doing our work thoroughly.

### The Junior Bar Survey

Fortunately, there is one phase of our work where we may take advantage of a movement which has been in progress for several years. In 1938 here at Cleveland, seven committees on the improvement of the administration of justice under the general chairmanship of Judge John J. Parker, made reports which met with the unanimous acceptance of the House of Delegates and of the Assembly of the Association. These reports prescribed minimum standards of sound judicial administration. With the aid of the National Conference of Judicial Councils, the members of the Junior Bar Conference have already assembled material in all of the states in answer to seven extensive questionnaires showing the degree of acceptance in each jurisdiction of the minimum standards of justice approved by the Association. Thus the raw material for a preliminary report on a considerable part of the third topic of our service, the judicial service of the bar, is in such shape that it seems likely that, with the continued cooperation of the Junior Bar Conference, the report may be presented to the profession and the public within the next twelve months.

Meantime, the work of the Survey will be pushed on many fronts with the cooperation and support of leaders and experts in many fields of professional activity, with the hope that by the time of the next annual meeting of the Association in Seattle we will be able to place first reports on most, if not all, phases of the Survey in the hands of interested members of the profession and of the public.

### *Double Trouble*

A United States judge in the Indian Territory was once asked:

"Judge, you know the tribal law about stealing in our tribe."

"I do," said the judge.

"You know when we catch a man stealing we whip him the first time and shoot him the second time."

"I do."

"Well, Judge, there's a powerful bad man named Jackson over our way. He went a few nights ago and stole two of the finest pigs you ever laid eyes on. Now, Judge ——"

"Yes," interposed Stewart.

"What I want to know is this: Can't I have that man Jackson whipped for stealing one pig and shot for stealing the other one?"

## *A Pattern for a Testamentary Trust*

# The Will of John Isekore

Condensed from *Dicta*, August, 1947

THE following fictional testamentary trust was prepared for a panel discussion at the Denver Institute meeting of the Colorado Bar Association, June 7, 1947. It was prepared by a number of experts representing different elements of estate work.

### Facts

John Isekore (pronounced I-seek-ore—it's a pun, son), 50-year-old mining engineer died at noon on June 7, the day before he intended to embark on a trip to South America where he hoped to find the fortune which would make him and his family financially independent. He left a 40-year-old widow, Ada, a 21-year-old son, Donald, an 18-year-old son, Carl, now in military service overseas, and an adopted daughter, Bertha, 16. Even though the death was quite sudden and unexpected, his family was saved from financial disaster because he had just executed that morning his will, drafted by several experts in estate planning: Morrison Shafroth, Denver attorney; Hugh McLean, trust officer of the Colorado National Bank; Berton T. Gobble, Inheritance Tax Commissioner; and Edward C. King, dean of the University of Colorado Law School. Mr. "I-seek-ore" left an estate of approximately $80,000, in trust for his wife and children under the will executed but a few moments before his death.

It may be useful to publish the will of the late lamented John Isekore, the unwitting hero (or unwilling victim) of the panel discussion at the Denver Institute on June 7th. This draft has been given the most careful consideration of the panel members, and has been somewhat revised as a result of the discussion at the Institute. It is not being put forward as a model will. Its purpose is (1) to illustrate the usefulness of the testamentary trust in family situations such as Isekore's; (2) to present a draft of a will with a testamentary trust which would at least suggest most of the important points to be covered. It will, of course, require modification and adaptation in any given case. It is doubtless more elaborate than many situations will require. If it proves to be useful as a start-

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ing point and a repository of suggestions and reminders, it will have served its purpose and Isekore will not have lived and died in vain.

**Last Will and Testament of John Isekore**

I, JOHN ISEKORE, of Denver, Colorado, do hereby make, publish, and declare this my last will and testament, hereby revoking all wills and codicils heretofore made by me.

FIRST: I direct my executors to pay my lawful debts and the expenses inheritance, estate, legacy, succession, or other death taxes payable in respect of my estate or of any devise, legacy, or distribution under this my will, or levied by reason of my death (including those levied on proceeds of policies of insurance on my life) whether or not the property, transfer or proceeds with respect to which said taxes are levied are a part of my estate at my death. My executors shall not require any transferee to reimburse my estate for said taxes so paid, nor shall they deduct the same from the share of any beneficiary hereunder. (This clause should only be used in cases where, as here, it appears that there is no danger of frustrating the testator's intention by requiring payment of large sums of taxes out of a residue which may be inadequate for the purpose.)

SECOND: I give and bequeath all my clothing, jewelry, books, pictures, household furniture and equipment, automobiles, and other similar personal effects as shall be a part of my estate at the time of my death, to my beloved wife, Ada Isekore, if she shall survive me; and if she shall not survive me, then to my children, to be divided among them as my executors may determine.

THIRD: All the rest, residue and remainder of my estate, of every kind and description, wherever situated, and whether now owned or hereafter acquired, including any property as to which I have a power of appointment by will, I give, devise and bequeath to my trustees hereinafter named, IN TRUST, NEVERTHELESS, to hold, manage, control, invest, and reinvest in accordance with the authority hereinafter conferred upon them, and to distribute the net income and the principal as follows:

A. If I am survived by my said wife, my trustees shall pay the net income to her as long as she shall live and shall remain my widow, making such payments in monthly installments as nearly equal as they deem practicable. For the purpose of equalizing such income my trustees may create such reserves of income as they deem necessary. If the trust estate shall include a residence property occupied as a family home, my trustees shall

permit my wife to occupy such home, rent free, as long as she remains unmarried and wishes to do so. The trustees shall pay taxes, repairs and upkeep of the property from the income of the trust. If my wife remarries or ceases to occupy such residence as her permanent home, the trustees may sell the property and add the proceeds to the principal of the trust, or may permit its occupancy by such of my children as the trustees may determine. If while my said wife is such beneficiary my trustees, in their sole discretion, shall deem the income insufficient to maintain and support my said wife, and to maintain, support, and educate my children, my trustees may devote to the relief of my wife, or children, or both, such portions of the principal as they deem necessary or proper under the circumstances, and in determining the need for or propriety of any such payment shall take into consideration all other income or means of support available to them respectively. In addition to any other payments herein provided for, my trustees may pay from principal the expenses of the last illness and funeral of my wife and of my children. The decision of my trustees as to the necessity for or amount of any such principal payment shall be conclusive on all persons having an interest in my trust estate.

B. If I am survived by my said wife and she does not remarry then upon her death my trustees shall distribute the remainder of my trust estate unto such of my descendants and the spouses of my descendants, in such manner and proportions, and upon such limitations and conditions, as my said wife shall appoint by her last will and testament.

C. If (1) I should survive my wife then as soon as practicable after my death, or (2) having survived me and having remained my widow my wife shall fail to exercise effectively the power of appointment hereinabove conferred upon her then upon her death, or (3) having survived my wife shall remarry, then upon such remarriage, my trustees shall divide the then balance of my trust estate into as many equal separate funds as will make one for each of my then surviving children, and one also for the then surviving descendants collectively of each deceased child of mine, which funds (or fund, if there shall be but one), shall be distributed as follows:

1. The property of any fund so created for the descendants of a deceased child of mine shall be distributed forthwith unto such descendants *per stirpes.*

2. The property of any fund so created for a child of mine who has reached the age of twenty-five years shall be distributed forthwith unto such child.

3. From any such fund so created for a child of mine who has not reached the age of twenty-five years my trustees shall devote to such child's support and education as much of the income or principal, or both, as they deem necessary or proper for the purpose while such child is under the age of twenty-five years, adding excess income, if any, to principal, and when such child has reached the age of twenty-five years shall distribute unto such child the entire remainder of such fund. If such child should die before reaching the age of twenty-five years then upon his or her death my trustees shall distribute the remainder of such fund unto such person or persons as such child shall appoint by his last will and testament (this is, of course, a general power of appointment, and as such would be subject to federal estate tax in the estate of the donee of the power. Under the provision of Sec. 811 (f) of the Internal Revenue Code, this federal taxation can be avoided if the power is made a special one) and, in default of effective appointment, to such child's then surviving descendants *per stirpes,* if any, and if none, to


*"So what if she can't cook—you chump!"*

my then surviving descendants *per stirpes*.

D. If, under the provisions of the foregoing section C, final distribution of a fund or portion of a fund previously held for one beneficiary is to be made to another beneficiary for whom at that time my trustees hold a separate fund hereunder, such share, instead of being distributed directly to such latter beneficiary, shall be added to his or her separate trust fund for administration and distribution as a part thereof.

E. If, at any time after my death, there should be no person in being qualified to receive my trust estate or the benefits thereof under the foregoing provisions hereof, then my trust estate, or the portion thereof with respect to which such total failure of qualified recipients has occurred, shall be distributed unto such persons as would have been my heirs at law under the laws of Colorado had I died immediately after the time at which such total failure of qualified recipients occurred.

F. No rights of the beneficiaries hereunder shall be subject to assignment or to anticipation, or liable for any indebtedness or obligation of any beneficiary, or subject to attachment or any other order, decree, or process of court on account of, or for the purpose of collecting, any such indebtedness or obligation and my trustees shall not be required to make any disbursement to any assignee or creditor of any beneficiary, or otherwise than into the hands of the beneficiary in person.

G. The only children of mine now living are my son, Carl, born February 5, 1929, my son Donald, who was born January 7, 1926, and my daughter Bertha, who was born March 10, 1931 and adopted by my wife and me in the same year; but wherever herein my children are referred to it is my intention to include not only my children above named, but any other children who may be born to my wife and me or adopted by us. Descendants of adopted children shall be considered descendants of mine as full for all purposes as if such adopted children had been born to my wife and me.

H. Anything herein elsewhere to the contrary notwithstanding, all the property of the entire trust estate shall be finally distributed not later than twenty-one years after the date of the death of the last survivor of the group composed of myself, my said wife, and those of my children or descendants who are living at the date of my death, and if, at the expiration of such period, any part of the trust estate remains undistributed, the same shall immediately vest in, and be distributed to, the persons then entitled to receive the income from the trust estate, in

the proportions to which they are so entitled.

FOURTH: I appoint my son Donald and the Tenth Bank and Trust Company, a national bank having its principal place of business in Denver, Colorado, the executors of and trustees under this my last will and testament, and direct that they be permitted to qualify and serve without giving bond in this or in any other jurisdiction.

FIFTH: My executors and trustees, in each capacity, and whether one or more, shall have full and unrestricted discretionary power and authority to hold, manage, control, improve, grant, convey, deliver, assign, transfer, lease, option, mortgage, pledge, borrow upon the credit of, contract with respect to, or otherwise deal with or dispose of, without application to or order of court, the property of my estate and trust estate, without any duty upon any person dealing with them to see to the application of any money or other property delivered to them, it being my express intention to confer upon my executors and trustees, in each capacity, every power of management which might be conferred upon them by an express enumeration of separate powers, including, but without limiting the generality of the above powers, discretionary authority to:

A. Make allocations to funds or distributions to beneficiaries in kind or in cash, or partly in kind and partly in cash, at valuations determined by them.

B. Hold property in their name or in the name of the corporate trustee or its nominee without disclosing the fact that the property is held in a fiduciary capacity.

C. Make distributions to or for the benefit of minors as if such minors were of full age and without the intervention of a guardian.

D. Except when a division is necessary for purposes of distribution, hold separate funds in one consolidated fund in which the separate funds shall have undivided interests.

E. Hold any property which I may own at the time of my death for such time as they deem wise (not inconsistent with the provisions hereof regarding distribution), even though such property is not of a kind usually selected by trustees as a trust investment, and even though such retention may result in inadequate diversification.

F. Invest and reinvest all or part of the principal of the trust estate in real or personal property, including corporate bonds, debentures, stocks (common or preferred), real estate mortgage bonds or notes or participations therein, and other investments, including common trust funds and investment trusts, in their discretion, without limiting such investments to the classes of

securities or property which are now or may hereafter be prescribed by law as those in which trust funds shall be invested.

G. Vote any corporate stock by proxy, and to execute general or restricted proxies to one or more nominees; to exercise any options or rights issued in connection with bonds or stocks.

H. Determine how all receipts and disbursements shall be credited, charged, or apportioned as between income and principal; provided, however, (1) that, upon the death of any beneficiary entitled to receive income hereunder all undistributed income to which such beneficiary would have been entitled had he lived until the next distribution date shall be treated as if it had accrued immediately following the death of such beneficiary; (2) that neither my executors nor my trustees shall be required to amortize or otherwise provide for the gradual extinguishment of the difference between face and market value of securities, but may amortize such difference from income if they think best; (3) that all dividends which are payable only in shares of the corporation declaring the same, all disbursements of the corporate assets designated by the corporation as a return or division of capital, and all amounts paid upon corporate shares upon disbursement of the corporate assets to the stockholders shall be deemed principal, except that amounts paid on account of cash dividends declared before liquidation or as arrears of preferred or guaranteed cash dividends shall be deemed income; (4) that all other dividends, including extraordinary dividends and dividends payable in stock of corporations other than the declaring corporation, shall be deemed income; and (5) that all rights to subscribe to the shares or other obligations of a corporation, and the proceeds of the sales of such rights, shall be deemed principal.

I. The corporate trustee shall have sole responsibility for custody and safekeeping of the trust securities and for the collection of interest and principal, and for keeping accounts of the trust. It shall receive for its services such fees as are reasonable and just, to be determined in accordance with the schedule of fees deemed customary in such cases. The individual trustee shall serve without compensation.

J. The corporate trustee may resign the trust hereby created, at any time by giving sixty days written notice to the adult beneficiary or beneficiaries then entitled to income, a majority of whom may thereupon designate a new trustee by written appointment filed with the resigning corporate trustee. If such appointment be not made within sixty days, a new trustee may be appointed by any court having

jurisdiction. Any successor corporate trustee shall be a bank or trust company doing business in the City and County of Denver, having a capital stock of one million dollars or more. The resigning corporate trustee shall transfer the trust property to the new corporate trustee and the individual trustee, and the rights, duties and liabilities of the resigning trustee shall thereupon terminate. Any successor trustee shall thereupon and thereafter have the same powers and discretions as the original trustee. In case of the death or resignation of the individual trustee, a successor individual trustee may be designated by written appointment of a majority of the beneficiaries then entitled to income, filed with the corporate trustee, and if no such appointment be made within sixty days after such death or resignation of the individual trustee, the corporate trustee shall become the sole trustee of this trust, with all the power and discretions herein conferred upon my trustees.

SIXTH: I understand that under the laws of Colorado now existing my wife may have the right to reject the provisions herein made for her and elect to take instead one-half of all the property of my estate. However, this will is planned primarily for her protection, with her full knowledge and approval, and her assurance to me that if I predecease her she will accept the provisions hereof, and it is my hope and expectation that she will do so; if, however, she should not do so, then it is my will that she shall take nothing hereunder and that, as to the remaining one-half of my estate, all the provisions hereof shall be construed and enforced as if my wife had predeceased me.

IN WITNESS WHEREOF I have hereunto subscribed my name this .... day of ....., 1947.

.....

The foregoing instrument, consisting of five typewritten pages, including this page (each page being identified by the signature or initials of the testator), was subscribed, published, and declared by the above named testator to be his last will and testament, in the presence of us, who, in his presence, at his request, and in the presence of each other, have hereunto subscribed our names as witnesses; and we declare that at the time of the execution of this instrument the said testator, according to our best knowledge and belief, was of sound mind and disposing memory and under no constraint.

Dated at Denver, Colorado, this ..... day of ....., 1947.

..... Address .....

..... Address .....

..... Address .....

# Summary of American Law—A Review

By ARTHUR BRAMLEY

From Vanderbilt Law Review, December, 1947

"A TEXT of 31 subjects for less than the price of one." So reads the publisher's ad for Dr. Clark's *Summary of American Law*. It must be fairly said at the outset, however, that neither the publishers nor Dr. Clark intended this book as a complete study of all or any fields of the law. It is a *summary*—no more, no less. But the surprising thing is that it is good. Where others have tried —and failed—to present a complete, readable, and understandable summary of American law Clark has succeeded.

Why do I think Clark has succeeded and why will this book sell well when others in the same line have proved only financial gut aches to their publishers?

First of all, the author has not merely strung together a bunch of quotations from "great and learned judges." Rather he has stated the law in each field in a plain and orderly fashion, at the same time taking care only to stress those topics with which the practicing lawyer will have contact. There is a refreshing lack of hypothetical academic questions through which the attorney must usually wander in his efforts to arrive at the answer to a simple but momentarily forgotten question of law. Instead, pertinent practical questions are discussed in equally practical terms.

The lawyer will by no means find *Summary of American Law* a solution to his specific problems. What he will find there is a preliminary statement of his problem—an excellent starting point for the always necessary thorough research which must follow. Articles, comments, and other material cited in the footnotes are not padding in any sense of the word. Rather they have been carefully selected so as to lead the searcher quickly to the answer or at least to a discussion of the answer he is seeking.

One who reads the chapter on contracts will perhaps be dismayed to find only twenty-four pages on that subject, twenty-three on criminal law, twenty on corporations, and a scant seven on agency. But this book, remember, is a summary. Whether the reader is a practicing attorney, law teacher, law student or layman, if he bears that fact in mind, he will find *Summary of*

*American Law* novel and stimulating.

One feels, on reading this book that the author's primary intended beneficiaries are law students. Indeed, in his preface he laments the fact that ". . . even if the student is fortunate enough to get a bird's-eye view of each subject which he studies in the law school there is a large number of subjects—about a third—which he does not take at all." The reader also is led to believe that Clark in some measure at least hopes that his present work will serve to rectify that condition. If that is one of his purposes in writing this book he scores again. As Dean Pound points out in his introduction to the book, legal education is presently undergoing numerous changes and readjustments. Perhaps the author's work is a beam of light on the shape of things to come in that regard. At least, as Pound observes, "Dr. Clark's plan deserves thoughtful consideration."


*"Remember the D. A. that tucked us away? He's running for President. I don't wish him any hard luck . . . but I hope he's elected!"*

# Among the New Decisions

**Adoption** — *contract to adopt.* In Clarkson v. Bliley, 185 Va 82, 171 ALR 1308, 38 SE2d 22, opinion by Judge Browning, it was held that under Virginia law the right to inherit as an adopted child cannot be created by private contract; the statutory steps are absolutely essential to the creation of the artificial relationship of parent and child out of which relationship alone the mutual rights of inheritance spring.

A supplemental annotation on "Specific performance of, or status of child under, contract to adopt not fully performed" appears in 171 ALR 1315.

**Attorneys** — *"heir-hunting" by nonlawyer.* The field of the lawyer was enlarged in Re Butler, 29 Cal2d 419, 171 ALR 343, 177 P2d 16. Judge Spence wrote the opinion. It was there held that a transaction by which a nonlawyer, in accordance with his general business practice, contracts and solicits beneficiaries of decedents' estates, secures their authorization to appear for them, and enters into agreements with them whereby he receives a power of attorney and is authorized to employ attorneys to represent them and he agrees to pay all expenses, including attorneys' fees and court costs, and thus assumes complete control of litigation instituted on behalf of the beneficiaries through attorneys hired by him, in consideration of their assignment to him of a part of their interests in the estate, amounts to commercial exploitation of the legal profession and is contrary to public policy.

The annotation in 171 ALR 351 discusses the question "Heir-hunting."

**Automobile Insurance** — *cancelation of compulsory automobile insurance.* The New Jersey Court of Errors and Appeals in Leitner v. Citizens Casualty Co., — NJ —, 171 ALR 546, 52 A2d 687, opinion by Judge Heher, held that statutory rights of the public under an automobile indemnity policy required for the protection of the public as a con-

dition of obtaining municipal consent to operate a taxicab cannot be impaired by stipulations between the immediate parties to the contract, and provisions affecting interest of the third-party beneficiaries may not be incorporated therein unless authorized by statute.

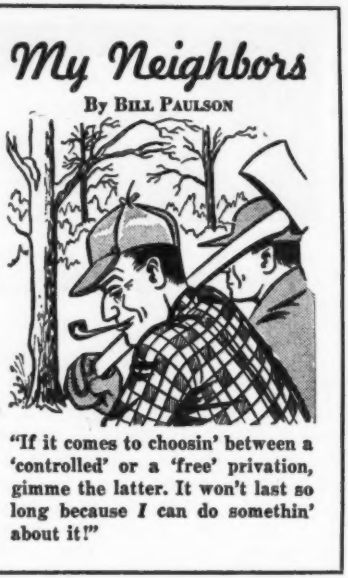
The annotation in 171 ALR 550 discusses "Cancelation of compulsory automobile insurance."

**Automobile Insurance** — *fire loss as covered by liability policy.* The insurer was held liable in General Accident Fire & Life Assur. Corp. v. Hanley Oil Co., 321 Mass 72, 171 ALR 497, 72 NE2d 1, opinion by Judge Wilkins. The case holds that damages from fire when fuel oil pumped from a delivery truck into a householder's cellar tank overflowed upon the floor of the cellar and became ignited without human agency is within a policy insuring the truck owner from liability for property damages "caused by accident and arising out of the ownership, maintenance or use of" the truck.

The title of the annotation in 171 ALR 501 is "Fire loss or damage as within coverage of automobile liability policy."

**Automobile Insurance** — *mechanical failure or breakdown.* The Tennessee Supreme Court in Lunn v. Indiana Lumbermens Mut. Ins. Co., — Tenn —, 171 ALR 259, 201 NW2d 978, opinion by Tomlinson, J., held that the sole proximate cause of damage to an automobile resulting when the hood latch broke and the hood, by force of the wind from the moving car, was thrown up and back against the front of the car, damaging it, is the breaking of the hood latch, and such damage is within the meaning of the clause of the automobile insurance policy excluding liability for any damage due to mechanical breakdown.

The annotation in 171 ALR 264 discusses "Automobile insurance: exceptions excluding loss or damage from mechanical failure or breakdown."




**"If it comes to choosin' between a 'controlled' or a 'free' privation, gimme the latter. It won't last so long because *I* can do somethin' about it!"**

**Bills and Notes** — *indication of alteration on.* Where a check for $5,000, written in pencil, bearing signs of erasure in the places where the amount is written and of the use of a different pencil in writing the amount, was cashed by a bank for a payee who was known to its officers only by sight and after ascertaining from the drawee bank that the drawer had sufficient funds, the question whether the bank which took the check was a holder in due course must be determined by the jury. Miles City Bank v. Askin, — Mont —, 171 ALR 790, 179 P2d 750, opinion by Judge Cheadle.

The annotation in 171 ALR 798 discusses "Bills and notes: indication of alteration as affecting transferee's character as holder in due course."

**Bonds** — *pro rata payment of.* The Colorado Court in Rising v. Hoffman, — Colo —, 171 ALR 1024, 179 P2d 430, opinion by Alter, J., held that when a local improvement district becomes insolvent and there are insufficient funds with which to retire its bonds, all of which have matured, and the fund from which they are payable cannot be replenished by additional levies, a proration of available funds among the owners of such bonds is required.

The annotation in 171 ALR 1033 supplements a prior annotation on the question "Right of creditor of public body to full or pro rata payment when fund out of which obligation is payable is insufficient to pay all like obligations of equal dignity."

**Brokers** — *time of sharing commissions.* In Sheketoff v. Prevedine, 133 Conn 389, 171 ALR 1009, 51 A2d 922, opinion by Brown, J., it was held that as the phrase "divide the commission" in a contract between brokers to share the commission on a sale of real property does not refer to the division of a right of one of the brokers to collect a commission from the owner at some future time but to the division of a sum which is already received from the owner and available for division, the receipt of the commission by a broker is a condition precedent to the right of the other broker to recover from him a share of a commission earned under the agreement.

See the annotation in 171 ALR 1012 on "Construction of agreement between real-estate agents to share commissions."

**Civil Rights** — *remedies to enforce.* Civil rights were extended by the decision by Judge Carter in Orloff v Los Angeles Turf Club, 30 Cal2d (Adv 105), 171 ALR 913, 180 P2d 321. It was there held that the provisions of a statute imposing an obligation on proprietors of places of amusement to admit adult persons who tender proper admission tickets or the price thereof, that anyone refused admission in violation of the stat-

ute may recover $100 penalty as well as compensatory damages, do not establish conditions precedent or constitute any form of unusual procedure required to obtain relief and, in view of the requirement that the statute is to be liberally construed, do not exclude availability of preventative injunctive relief against one violating the statute where the statutory remedy is inadequate.

The annotation in 171 ALR 920 discusses "Private rights and remedies to enforce right based on civil rights statute."

**Community Property** — *partition or severance of.* In King v. Bruce, — Tex —, 171 ALR 1328, 201 SW2d 803, opinion by Judge Taylor, it was held that the validity and effect of a contract made in New York between husband and wife who were citizens of and domiciled in Texas, by which the parties attempted to transfer to each other as separate property one half of a community fund previously transferred by them from a Texas bank to a New York bank, for the declared purpose of securing to the wife enjoyment in Texas of the property segregated to her and the benefits in that state incident to its ownership, is governed by the law of Texas, not by the law of New York, and the character of the fund as community property is no wise affected so far as the law of Texas is concerned.

The annotation in 171 ALR 1336 discusses "Severance or partition by the act of spouses of community property into separate property of each."

**Constitutional Law** — *comment on failure of accused to testify.* The United States Supreme Court, majority opinion by Mr. Justice Reed, held in Adamson v. California, 332 US 46, 91 L ed 1903, 171 ALR 1223, 67 S Ct 1672, that the dilemma created by California law which permits the disclosure of a former conviction to the jury to impeach the testimony of an accused who takes the witness stand to deny or explain away other evidence, while also permitting his failure to explain or deny evidence against him to be commented upon by court or counsel, and to be considered by court or jury, does not involve such a denial of due process as to invalidate a conviction in a state court, even in a case where the evidence against one charged with murder is wholly circumstantial so that cross-examination as to former crimes to impeach his veracity should he take the stand to deny the evidence against him might well bring about his conviction.

A comment note on the question "Constitutional or statutory provision permitting comment on failure of defendant in criminal case to explain or deny by his testimony, evidence or facts against him" appears in 171 ALR 1267.

**Divorce and Separation** — *transactions after divorce.* Chief Justice Christianson in Barker v. Barker, — ND —, 171 ALR 447, 27 NW2d 576, develops the law of trust relationships. It is there held that a transaction by which the divorced parents of minor children orally agree that the father shall purchase a home for the mother and children, whose custody was awarded her by the divorce decree, and the father makes a down payment thereon and both parties execute a promissory note and mortgage on the premises for the balance of the purchase price, and by which it is agreed that the title shall be taken in the name of both parties as grantees, involves a confidential relationship between the parties, and the action of the father in refusing to have the mother named as a grantee in the deed amounts to fraud and gives rise to a trust by operation of law, entitling the mother to a decree that he holds the property in trust.


*"Your Honor, she spends every spare minute of her time cooking, baking, darning things and fixing up around the house."*

The title to the annotation in 171 ALR 455 is "Confidential relations between former husband and wife as affecting contracts or other transactions after divorce."

**Easements** — *tacking adverse possession.* In Trueblood v. Pierce, — Colo —, 171 ALR 1270, 179 P2d 671, opinion by Judge Alter, the Colorado Court held that where a lot owner and his predecessor in title have had adverse possession and use of a driveway across the adjoining lot of another for successive periods which, when added together, exceed the statutory period, and the predecessor in title delivered possession of the driveway at the time of conveying the lot to such owner, the doctrine of tacking is applicable and a prescriptive easement exists.

The annotation in 171 ALR 1278 discusses "Tacking as applied to prescriptive easements."

**Estoppel** — *of municipality as to streets.* According to the Oklahoma Court in Chouteau v. Blankenship, 194 Okla 401, 171 ALR 87, 152 P2d 379, opinion by Judge Hurst, the doctrine of equitable estoppel, if applicable to a right of a municipality to assert title to a street, will be applied only in exceptional cases and with great caution.

The different views on this

question are thoroughly discussed in the annotation in 171 ALR 94.

**Evidence** — *intent or state of mind.* In Cope v. Davison, 30 Cal2d (Adv 190), 171 ALR 667, 180 P2d 873, opinion by Judge Edmonds, it was held that in an action against the driver of an automobile by a guest in the automobile injured when it skidded off the highway, based on alleged wilful misconduct of the defendant in operating the automobile at an unsafe rate of speed on a wet pavement when approaching a curve on the highway, the court may properly permit the defendant to be questioned concerning his intent to cause injury and to testify that he did not intend to injure the plaintiff or anyone else in the automobile, as bearing upon the issue of intent and knowledge and to prove the defendant's state of mind contemporaneously with the accident, even though intent to injure is not a necessary ingredient of wilful misconduct.

The annotation in 171 ALR 683 discusses "Admissibility in civil case of testimony by one charged with wilful misconduct as to his intention or state of mind at time in question."

**Executions** — *injunction against levy of.* The syllabus by the Oklahoma Court in Baker v. Lloyd, — Okla —, 171 ALR 217, 179 P2d 913, opinion by Chief Justice Hurst, describes the case. It is to the effect that injunction will lie at the instance of a plaintiff who is not the judgment debtor to prevent the levy of execution on a stock of merchandise in a going mercantile business belonging to the plaintiff, which will prevent the carrying on of the business and will mean the loss of credit and commercial ruin, the plaintiff not having a plain, speedy and adequate remedy at law. In such a case it is not necessary for the plaintiff to allege the insolvency of the defendants.

The annotation in 171 ALR 221 discusses "Inadequacy of legal remedy as basis for equitable relief from levy of execution."

**Executors and Administrators** — *liability for depreciation.* The decision in McInnes v. Goldthwaite, — NH —, 171 ALR 1414, 52 A2d 795, opinion by Judge Johnston, is to the effect that an executor who has unduly delayed to sell several nonlegal securities owned by the decedent, some of which were sold at an increase over, and others at less than the market value at the time they should have been sold, commits but a single breach of trust and so is chargeable only with the net loss.

A practical annotation in 171 ALR 1422 discusses the question "Fiduciary's liability for depreciation in value of securities, as affected by appreciation of other securities."

**Food** — *presumption of negligence.* In Coca-Cola Bottling Works v. Sullivan, 178 Tenn 405, 171 ALR 1200, 158 SW2d 721, opinion by Chambliss, J., it was held that the res ipsa loquitur doctrine may be invoked against the manufacturer or bottler of packaged foods or bottled drinks in favor of a consumer who is injured by a foreign substance in the food or drink, when the package or bottle passes directly from the agent of the manufacturer or bottler to the consumer or when the package comes from the manufacturer so constructed or sealed that its contents reach the consumer without possibility of alteration by intermediate parties.

See the annotation in 171 ALR 1209 supplementing earlier treatments of the subject.

**Fraud and Deceit** — *allowance of interest in action of.*


*"As I see it the oldest in the family should have legal priority of ownership until such a time as he chooses to relinquish voluntarily such ownership to those younger members of said family!"*

Chief Justice Loughran in Flamm v. Noble, 296 NY 262, 171 ALR 812, 72 NE2d 886, upheld the right to interest in a fraud action. The holding is to the effect that in an action for damages for fraud and duress whereby plaintiff was led to part with certain corporate stock for less than its true value, plaintiff is entitled as a matter of law to have interest from the date of the wrong to the date of rendition of the verdict added to the verdict, though the value of the stock, which was closely held, was not ascertainable with reasonable certainty as of any fixed day.

An extensive annotation in 171 ALR 816 discusses the point in the above case.

**Infants** — *removal from state.* The Alabama Court in Little v. Little, — Ala —, 171 ALR 1399, 30 So2d 386, opinion by Judge Foster, held that when jurisdiction has attached in an action for divorce and for custody of a minor child of the parties the removal of the child to another state by one of the parties does not defeat the jurisdiction and power of the court to award custody of the child.

The title to the annotation in 171 ALR 1405 is "Removal of child from state pending proceedings for custody as defeating jurisdiction to award custody."


**"Maybe it's unfair to the fleas but fleas and Communists are a lot alike. It don't take a whole hideful to make you mighty uncomfortable!!"**

**Joint Ownership** — *instrument naming two or more payees in alternative.* Rights arising out of a negotiable instrument made payable in the alternative are discussed in Reese v. First National Bank (Tex Civ App) 171 ALR 516, 196 SW2d 48, opinion by Judge Cody. The case holds that a time certificate of deposit payable to the order of the depositor or another person named on return of the certificate properly indorsed, with interest at a stipulated rate, is a negotiable certificate of deposit.

Annotation: 171 ALR 522 "Instruments for payment of money naming in alternative two or more payees."

**Joint Tort-Feasors** — *indemnitor's rights.* In Indemnity Ins.

Co. of N. A. v. Otis Elevator Co. 315 Mich 393, 171 ALR 266, 24 NW2d 104, opinion by Judge Starr, it was held that where the negligence of an elevator company was the sole and proximate cause of injuries to a person on a hotel elevator which the former was under duty to maintain, and the hotel company was free from concurrent negligence, an insurer of the hotel company which paid the amount recovered against the latter and took an assignment and subrogation from it is entitled to recover indemnity from the elevator company.

The annotation in 171 ALR 271 discusses "Right of indemnitor of one joint tort-feasor to contribution by or indemnity against other joint tort-feasor or indemnitor of the latter."

**Judgment** — *notice of to party.* A procedural question is involved in Industrial Loan & Thrift Corp. v. Swanson, — Minn —, 177 ALR 244, 26 NW 2d 625. The opinion was written by Judge Peterson. It was held that the "notice" intended by a statutory provision for a relief from a judgment on the ground of mistake, inadvertence, surprise, or excusable neglect, upon application made within one year "after notice thereof," is actual notice or knowledge and not constructive notice.

See the annotation in 171 ALR 253 on "Notice contemplated by statute for relief from judgment upon application within specified time after notice."

**Libel and Slander** — *charge of communism or political belief.* The United States Circuit Court of Appeals, Seventh Circuit, opinion by Circuit Judge Kerner, in Spanel v. Pegler, 169 F2d 619, 171 ALR 699, held that in Illinois it is libelous per se to write of another that he is a Communist or a Communist sympathizer, since the label of Communist today, in the minds of many average respectable persons, places one beyond the pale of respectability, making him a symbol of public hatred.

See the annotation in 171 ALR 709 supplementing an earlier annotation in the series on "Libel and slander: imputation of objectionable political or sociological principles or practices."

**Limitation of Actions** — *amendment of complaint after limitation period.* The Rhode Island Supreme Court in O'Brien v. M & P Theatres Corp. — RI —, 171 ALR 1081, 50 A2d 781, opinion by Baker, J., held that no new cause of action is introduced by amending, after the statute of limitations has run, a declaration in a negligence action for injuries received when plaintiff slipped on or caught her foot in a worn stair carpet and fell, so as also to charge that defendant negligently failed to light the stairway properly.

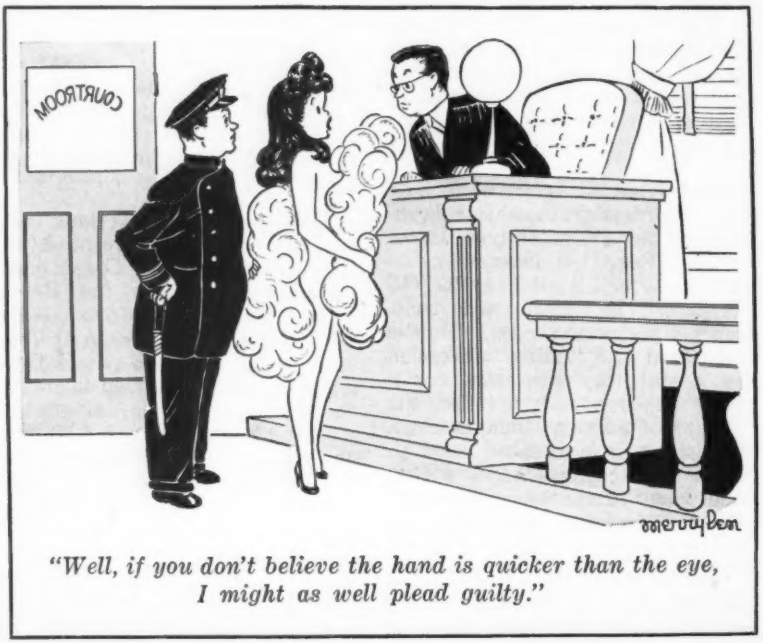
An extensive annotation in

171 ALR 1087 discusses the question "Amendment after limitation period of allegations of negligence as stating new cause of action."

**Mutual Benefit Society** — *effect of change of bylaws.* The Illinois Court in Fichter v Milk Wagon Drivers' Union, 382 Ill 91, 171 ALR 1, 46 NE2d 921, opinion by Gunn, J., takes the position that amended bylaws of a labor union reducing sickness or disability benefits to members cannot be applied to a claim for continuing benefits that had accrued and was being paid at the time the amendment was made, notwithstanding that the constitution and bylaws of the union authorized change of bylaws.

The conflict in authority on the question "Changes in regard to benefits by subsequent amendments of bylaws or constitutions of mutual benefit society" is discussed in 171 ALR 7.

**National Housing Agency** — *compliance with local zoning laws.* An interesting constitutional question was involved in




*"Well, if you don't believe the hand is quicker than the eye, I might as well plead guilty."*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Tim v. Long Branch, — NJ —, 171 ALR 320, 53 A2d 164, opinion by Judge Wachenfeld. It was there held that the National Housing Agency, as an agency of the Federal government, acting under and pursuant to the Lanham Act (42 USC §§ 1521 et seq), providing for housing of persons engaged in national defense activities in areas and localities where acute housing shortages exist or impend, in remodeling a dwelling house on property acquired by it into apartments is not required to comply with local zoning laws, the provisions of 42 USC § 1545, directing consultation with local officials and housing authorities to the end that projects constructed under the act, "so far as may be practicable, conform in location and design to local planning and tradition," indicating a desire to comply with but not to be bound inflexibly by local ordinances.

The annotation in 171 ALR 325 discusses "Zoning regulations as applicable to governmental projects."

**Negligence** — *contributory negligence in statutory actions.* The Minnesota Supreme Court in Dart v. Pure Oil Co. — Minn —, 171 ALR 885, 27 NW2d 555, opinion by Justice Gallagher, held that contributory negligence is available as a defense to an action based on a statute enacted for the protection of the public, as the violation of a statutory standard of conduct does not differ from ordinary negligence.

A comment note in 171 ALR 894 discusses this question.

**Negligence** — *last clear chance doctrine.* The Virginia Court in Harris Motor Lines v. Green, 184 Va 984, 171 ALR 359, 37 SE 2d 4, opinion by Judge Gregory, held that in order for the owner of a disabled truck negligently parked by its employee on the paved portion of a highway without lights or flares as required by law, to take advantage of the last clear chance doctrine against the defendant whose truck ran into the parked truck, it is incumbent upon the owner to show that his driver's negligence had terminated as a cause of the collision prior thereto.

A supplemental annotation in 171 ALR 365 discusses the recent developments in the cases considering the "last clear chance doctrine."

**Public Officers** — *removal as affected by absence of board member.* Applying the strict rules of a criminal trial the New Jersey Court of Errors and Appeals, in McAlpine v. Garfield Water Commission, — NJ —, 171 ALR 172, 52 A2d 759, held that the right of an employee concerned in dismissal proceedings before a duly constituted board or commission to be given a fair and impartial trial can be assured only when all members participating in the deliberations and the decisions of the board or commission, following hearings

on employee performance, had equal opportunity to hear and evaluate all of the evidence presented at the hearings.

The question discussed in 171 ALR 175 is "Validity of removal or discharge of governmental officer or employee as affected by absence of member of board or commission from hearing."

**Release** — *effect on unknown claims.* The general rule as to the effect of a release was applied in Norris v. Cohen, — Minn —, 171 ALR 178, 27 NW 2d 277, opinion by Judge Thomas Gallagher. The holding is to the effect that a release purporting to operate as a discharge of all claims, damages, and acts of whatever kind or nature up to the date thereof, does not extend to claims of which the releasor was wrongfully kept in ignorance by the releasee.

The title to the annotation in 171 ALR 184 is "Release as covering claims of which releasor was ignorant."

**Retrospective Case Law** — *overruling decision.* In a novel case Mickel v. New England Coal & Coke Co. 132 Conn 671, 171 ALR 1001, 47 A2d 187, opinion by Dickenson, J., it was held that the rule for measuring damages in actions for wrongful death as announced in a decision, restating and correcting the rule laid down in former decisions, may be applied retrospectively in another death action pending before the court at the time of rendition of the overruling decision.

The subject of the annotation in 171 ALR 1008 is "Judicial change of rule regarding measure of damages as applicable retrospectively."

**Specific Performance** — *expense in clearing title.* An interesting specific performance question was decided in Smith v. Farmers' State Bank, 390 Ill 374, 171 ALR 1291, 61 NE2d 557, opinion by Judge Stone. It was there held that a bank contracting to sell land and to convey an unencumbered title, which at the time it made its contract was apprised of the fact that its grantor derived title under a will, must abide by the effects of its negligence in failing to examine the will and to ascertain the title conveyed thereby to its grantor and cannot assert in defense to the purchaser's action for specific performance that performance was impossible, inequitable, and unjust because it would be required to deposit in escrow one half of the sale price to cover the discovered defect that the title was subject to a contingent remainder.

The title to the annotation in 171 ALR 1299 is "Specific performance of land contract where vendor will be compelled to acquire, or incur expense in clearing, title."

**Statute of Frauds** — *printing as signature.* Judge Ronan in

Irving v. Goodimate Company, 320 Mass 454, 171 ALR 326, 70 NE2d 414, wrote the opinion holding that a memorandum of a transaction is "signed by the party to be charged therewith" within the meaning of the statute of frauds if signed by the person to be charged, in his own name, or by his initials or his Christian name alone, or by a printed, stamped, or typewritten signature, if in signing in any of these methods he intended to authenticate the paper as his act.

See the annotation in 171 ALR 334 on "Printed, stamped, or typewritten name as satisfying requirement of statute of frauds as regards signature."

**Taxation** — *effect of break in transit.* The California Court in Von Hamm-Young Co. v. San Francisco, 29 Cal2d 798, 171 ALR 274, 178 P2d 745, opinion by Traynor, J., held that storage of goods transported by carriers to a seaport, pending availability of cargo space, is not such an interruption of interstate transportation for the convenience of their owner as to subject them to local taxation, although the goods were purchased with knowledge that cargo space might not be available and because if not purchased then they might not be purchasable later.

The annotation in 171 ALR 283 discusses "Break in transit in interstate commerce as affecting immunity of goods from local taxation."

**Trusts** — *provision relieving trustee from accounting.* Attorneys who draft trust instruments should examine the annotation in 171 ALR 631. The reported case Wood v. Honeyman, — Or —, 171 ALR 587, 169 P2d 131, in an elaborate opinion by Judge Rossman, holds that a trust instrument may relieve a trustee from the necessity of keeping formal accounts, but cannot legally relieve him from his duty to account in a court of equity.

The title to the annotation in 171 ALR 631 is "Validity, construction, and effect of provision of trust instrument relieving trustee from duty to account."

# A Generation of Improvement of the Administration of Justice

By ROSCOE POUND

*Condensed from*
*New York University Law Quarterly Review, July, 1947*

IN the nineteenth century there was general agreement that the end of law was to promote and maintain a regime of maximum free individual self-assertion, both creative and acquisitive. This idea was the culmination of one which had been developing in juristic thinking since the breakdown of the relationally organized society of the Middle Ages. It was accepted most completely by English and Americans and was taken to be the basic idea of our legal system. It made a special appeal to pioneer America and took root most firmly in this country. That it has definitely passed is plain enough. But just what has taken its place is not so clear.

Some of the changes in the law which have been brought about in the past fifty years by judicial decision or by judicial application of legislation will make the point. One is limitations on the liberty of using property which is a legal attribute of ownership. When I was a student of first-year property (in 1889) there was hardly a beginning of a doctrine of anti-social exercise of the liberties of an owner of land and those beginnings were strongly objected to by law teachers. Today we can see there has been a steady movement toward limiting exercise of the owner's *jus utendi* where the sole purpose is to injure a neighbor. The idea is no longer abstract liberty of action; it is coming to be one of equality of satisfaction of wants. Again, town planning and legislation against billboards are examples of a growing type of limitations upon building which proceed, not on the interest in the general security, but on a newly recognizing social interest in aesthetic surroundings.

Limitations on freedom of contract should be contrasted with the nineteenth-century doctrine that personality and liberty each required property and that freedom of contract involved both liberty and property. For a generation such limitations have been imposed increasingly both through legislation and through

judicial decision. As examples of limitation of freedom of contract through legislation, reference may be made to statutes requiring payment of wages in cash; statutes regulating conditions of labor, fixing hours of labor and minimum wages; forbidding contracts not to join labor unions, imposing collective bargaining, and empowering imposition of a multitude of administrative regulations. The scope of free contract as between employer and employee in industry has all but been eliminated. In the law of insurance legislation and judicial decision have cooperated to limit freedom of contract. Statutes such as valued policy laws, provisions as to warranties, and laws providing for standard policies, have taken many features of the subject out of the domain of agreement. To no small extent, under the guise of interpretation, the tendency of judicial decision is in effect to attach rights and liabilities to the relation of insurer and insured and thus remove the whole subject from the category of contract. Also the courts have taken the law of surety companies largely out of the category of suretyship, treating them as insurers rather than sureties. In the law of trusts there have come to be statutes in effect forbidding express provisions relieving testamentary trustees from liability for failure to exercise care, or limiting such liability. What is more important, judicial decision has established that the duties of public service companies do not flow from agreement nor from professing a public calling or dedicating property to a public use, but are imposed upon the calling. Hence there are many things upon which the utility and the patron are not permitted to agree. Moreover, legislation has committed large powers of regulation to administrative agencies which still further limits freedom to make contracts.

Limitations on the owner's *jus disponendi* must be looked at in contrast with the nineteenth-century idea that power of disposing was a necessary element in the very conception of property. These are statutory, but have been accepted by the courts without question.

Limitations on the power of a creditor or an injured party to exact satisfaction have been multiplying in recent years. For example, there are now statutes allowing court to render judgments for payment of debts in installments, for moratoria, for restricting forced sales and deficiency judgments in case of foreclosure of mortgages, and limiting enforcement of covenants by tenants to surrender possession at the expiration of the term. There is a notable tendency in recent legislation and in recent discussion to insist, not that the debtor keep full faith in all cases even though it

ruin him and his family, but that the creditor must take a risk also, either along with or in some cases instead of the debtor.

Liability without fault, responsibility for agencies employed and things maintained, as now imposed, are in sharp contrast to the mode of thought of the last century. Today there is a strong and growing tendency to extend the scope of liability without fault. This tendency is especially marked in placing upon enterprises the burden of repairing injuries, without fault of those who conduct them, which are incident to the undertaking. There is a strong tendency, where there is no blame on either side, to ask who can best bear the loss and hence to shift the loss without regard to fault. Workmen's compensation and employer's liability, as dealt with in present-day legislation, illustrate this.

In the present century there is a strong tendency to hold or to enact that running water and wild game are owned by the state or better that they are assets of society which are not capable of private appropriation or ownership except under regulations which protect the social interest in the use and conservation of natural resources. This has changed the whole water law of the western states and has profoundly affected the law as to natural gas and oil. The social interest in the use and conservation of natural resources is valued higher than those social interests which led the last century to insist exclusively in this connection on individual free self-assertion and individual liberties of an owner.

Again, there is a growing tendency to hold that public funds should respond for injuries to individuals by or in the operation of public agencies. There is a tendency to hold municipal corporations more widely liable and to break down the distinction between their corporate and their governmental activities. In the same direction liability is beginning to be imposed on charities, colleges, and hospitals for the torts of their servants and agents. The tendency the world over, as between the public and the individual who has been injured by the operation of governmental machinery or public institutions, is to shift the loss to the public instead of leaving it to rest on the luckless individual who happens to be hurt. We are all of us to bear the losses incident to the operation of agencies maintained for the benefit of all.

Again, there is a tendency to replace the purely contentious theory of litigation by one of adjustment of interests. It is brought about especially in the recent development of the declaratory judgment, but may be seen everywhere in legislation and rule making as to procedure today.

Other tendencies in the same

direction are a reading of reasonableness into the obligation of contracts—to require the terms as fixed by the parties to conform to equity; an increasing recognition of groups and associations as legal units instead of exclusive recognition of individuals and of certain historical organizations and business devices as their analogues; and a relaxing of the rules as to trespassers.

These changes which have taken place within a generation, while feeling for a new conception of the end of law, put a severe strain on the administration of justice. The older conception was clearly defined and had been all but universally received. Exactly what the new one is to be has not been worked out. Law has to maintain a balance between stability and change in order to uphold the economic order and maintain the general security. Advanced public opinion has no such task. Thus in a time of transition, administration of justice according to law is certain to give rise to dissatisfaction. Adjustment must be cautious. But there must be adjustment. It is a task of the scholarly lawyer to study the received ideals of the end of law and those which are being urged or are behind the new movements, to scrutinize the law and the judicial process in the light of them, and work toward adjusting the law and the judicial process to them intelligently.

### *Locus in Quo*

The case was one for divorce. The plaintiff husband had charged cruelty in general terms. We represented the defendant wife and moved for a bill of particulars which, as frequently happens in cases of this kind, we got with humiliating, not to say excruciating, details of the most intimate personal relationships between the parties to the case. The Judge, a bachelor of rotound outline and florid complexion, called the case for trial. Then as the two parties and their respective counsel sat at opposite tables, the judge proceeded to read the pleadings. By the time he had finished, his face was a deep red.

"Gentlemen," he fumbled, "I believe we'll try this case in chambers. Apparently that is where the cause of action arose."

—*Dicta.*


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# Lawyers in the Labor Field....

• Condensed from Boston Bar Bulletin, March, 1947

By DONALD A. SHAW
*of the Boston, Mass., Bar*

THE ARTICLE written by Robert M. Segal on "The Relation of Lawyers to Economists," published in The Bar Bulletin of February, 1947, and condensed in the September-October, 1947 issue of Case and Comment, emphasizes sharply the criticisms sometimes made of lawyers in administrative and industrial fields of the practice of law. Carried to its logical conclusion, the lawyer would be excluded from the practice of law in certain circumstances and would be replaced by the economist, whose infallibility as a counsellor is far from being established.

Mr. Segal's comments regarding the "Labor Field" seem especially to require further discussion and analysis.

All can agree with Mr. Segal that the handling of labor problems requires a special training and a knowledge of the elements involved in industrial relations. In dealing with the human relationships between a company and its employees, the same exactness cannot, and should not, be applied as in transactions involving real estate or merchandise, and decisions in labor relations must often take into account practical and psychological considerations which may require a different solution than would be dictated by the application of rigid rules. In negotiations with a union, a lawyer cannot proceed brusquely with the attitude that there is only one solution and no room for a compromise; if, in the rare case, there is only one solution, the lawyer cannot force it upon the parties arbitrarily and without negotiation in good faith. But, is Mr. Segal's conclusion justified that the specialists who handle these matters must be "labor rather than legal" specialists and that economists are better qualified to be labor specialists than are lawyers? Is the economist, who customarily deals in statistics and economic theories, better able to acquire the necessary background for handling labor relations than the lawyer, who customarily deals with law as applied to many aspects of social and industrial life? Certainly, a blanket condemnation of all lawyers in labor relations cannot follow because some, improperly or not at all trained in the labor field, have acted in a "legalistic" manner; economists, too, have made mistakes and not infrequently.

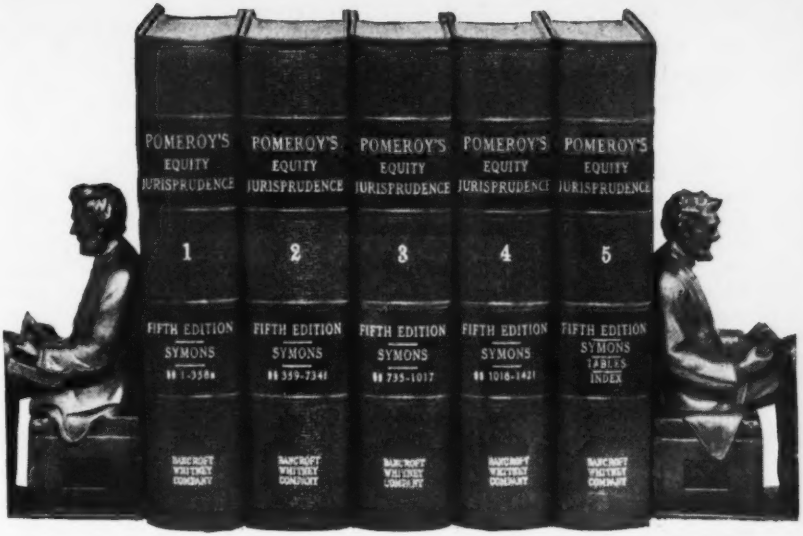
In many branches of the law, familiarity with non-legal mat-

ters is necessary and the lawyer obtains specialized information. But, in an action for personal injuries, it could not be contended successfully that because medical treatment is necessary a physician is better qualified to effect a settlement, or prosecute the claim to a successful conclusion, than is the lawyer. Mr. Segal states that in actual collective bargaining "more emphasis is now placed upon the economist rather than upon the lawyer" and that "it may well be that some labor conflicts can be avoided by intelligent well-versed management rather than insistence upon 'legalistic' phrases." This sort of comment has a familiar ring, but it is surprising to find it made by one who is an attorney as well as an economist. Some union organizers and business agents who refer to "legalistic tactics of lawyers," have a favorite approach to an employer, substantially as follows: "Mr. Blank, our union doesn't believe lawyers are necessary to negotiate an agreement between your workers and their employer. We can sit down together and get this thing cleaned up in a short time. You don't need to go to the expense of hiring a lawyer." At this point, perhaps Mr. Segal would have an economist, a "labor rather than a legal" specialist enter, with charts and neatly indexed volumes of statistics, and say, "That is right. Lawyers are not necessary, but the economist's approach is peculiarly adapted to the settlement of labor problems, whether technical, practical or of social significance." A most fitting reply to such proffered advice was given by a client of our office to the President of one of the newer unions when he suggested that there was no need for the company to hire a lawyer in connection with the ensuing negotiations, since the union was not represented by a lawyer. In reply to this comment, the company's President stated that if the President of the union came to discuss any phase of the product manufactured by the company, he was sure that he would know at least as much about it as the union representative would, but this new technique of dealing with employees according to rules and regulations prescribed by government boards was too much for him, and that he must obtain the services of competent counsel, who, he believed, would know as much about that technique as the union representative. Negotiations were then conducted with legal counsel present, in an orderly manner and terminating with a signed agreement.

Economic facts enter into the settlement of labor relations problems, particularly those involving wages, but it is submitted that Mr. Segal is including altogether too large a field when he states that "working conditions, check-off, union mem-

bership, seniority, workload, closed shop and union practices" are matters for the "labor specialists, or economist in the first instance" and, by implication, not for the lawyer. There seems to be no reason why a lawyer familiar with labor relations is not fully as competent as an economist to advise a client regarding such matters and, furthermore, a lawyer's advice in analysis of the various conflicting claims of economists on the cost of living, ability to pay, wage rates and piece rates can be of great assistance to clients engaged in collective bargaining negotiations. Perhaps Mr. Segal would leave to the lawyer the task of drafting the collective bargaining agreement after the terms had been agreed upon, but no lawyer can draw an agreement well enough to avoid pitfalls that the client has already fallen into in negotiations in which he has failed to take into account the effects of what he has agreed to. While a collective bargaining agreement should be written in such a way that the ordinary employee can understand it without a dictionary, it is important that it be written so that its provisions are


*"I think you're perfectly mean asking me questions like that knowing they'll get me into trouble!"*

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not ambiguous or subject to various interpretations which may lead to grievances, arbitrations or labor disturbances, which might have been avoided.

The client, whether company or union, can benefit greatly from the advice of a lawyer, familiar with labor relations, in analyzing the long range effect of acceptance or denial of proposals submitted. The function of the lawyer in advising a client engaged in collective bargaining negotiations is not to attempt to dictate what wage adjustments should be made or what union or company proposals should be granted. The lawyer can be of the utmost assistance in advising his client of the considerations which he must have in mind in reaching a decision. Throughout negotiations, questions may arise regarding the application of the Fair Labor Standards Act, the Walsh-Healey Public Contracts Act, the National Labor Relations Act, the Norris-LaGuardia Anti-Injunction Act, the amended Railway Labor Act, the Social Security Act, Unemployment Compensation Acts and other federal or state laws regarding wages, hours and working conditions, and there can be no doubt that the economist, or non-lawyer, is unqualified to advise concerning such matters.

Present standards of legal training require an education that is well-rounded, and the practice of law in itself provides an understanding of human nature and of social and business relationships that is acquired by few in other lines of endeavor. The lawyer entering the field of labor relations has a background which should form the basis for seasoned judgment, invaluable in the settlement of labor problems and the promotion of a sound labor relations policy.

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### *Simple Directions*

This is the lay will of a bachelor filed in Will Book No. 4, page 424 of Winchester, Tenn.

"Sherwood, Tenn
February 13, 1940

"Realizing the uncertainty of life and also that the machinery in my head is getting worn, old and brittle and liable to bust all to hell any minute, I am making my last and only will, dated Feb. 13, 1940, bequeathing my insurance and other property to my brother W. C. Gaffin who hereby appoints as my administrator without bond, he to pay my debts and blow the rest in as he sees fit as he won't be here long anyway.

"J. A. Gaffin."

Contributor: Frank L. Lynch,
Winchester, Tenn.

# A Layman's Interest in the Law

By HON. FRANK CARLSON
*Governor of Kansas*

Condensed from
The Journal of the Bar Association of the
State of Kansas, November, 1947

THE LAYMAN'S interest in the law is often abstract. He realizes that its proper functions mean to him security in his rights and privileges as a citizen and that it throws about him impregnable safeguards without which freedom of thought and action would not function in our modern complex society.

So grounded in the conscience of our people is respect for the laws of the land that we accept it as a fundamental concept and a daily guide. Without its refining influence our civilization would crumble and the world revert to chaos.

Those of us who look to the law for its protection and guidance have only a hazy understanding of its far-flung ramifications. We must rely upon the trained mind to make our laws operate with equal justice for all. The obligation rests heavily upon the students of the law to see that the definite purposes and objects of laws are not violated nor used by unscrupulous persons to evade the just punishment of crime and wrong doing.

It is axiomatic that every layman has an interest in law, but more especially should that be true of those who have chosen it as a profession. The public in general has a right to expect and does expect that the lawyer, in his daily life and in the discharge of his service to his clients, be mindful of the fact that laws function for the protection of the innocent as well as to punish the guilty.

Often the layman looks upon the law as something of a mystery which needs an explanation or a diagram to realize its meaning. So much of it is wrapped up in large books and legal phrases that he looks upon it with perplexed awe. I have often thought that a simplification of legal procedure, bringing it down to language as simple as the Ten Commandments, would do away with much of the confusion so prevalent among the common run of people, and at the same time have a tendency to eliminate fear and create a deeper and more abiding respect for law.

I am sure the student of law has a broader conception of his profession than the sole expec-

tation of monetary reward, although he is undoubtedly worthy of his hire. His rightful position in the community and in the nation rests also upon a life tempered by honesty, fairness and good citizenship. His training, his position and his knowledge open for him opportunities for service beyond that of the ordinary citizen. If he fails to meet that high standard he has performed a disservice, not only to his country but to the profession of which he is a part.

Having had a hand in their making, I am willing to admit that laws are not always perfect and need constant revision to make them serve the changing conditions. They are instruments fashioned by the minds and experience of men to safeguard the rights of the individual and to protect the rights of the minority and the rights of the weak. In all cases they are the product of enlightened government through the consent of the governed. I am sure no other nation on earth has come nearer to meeting the needs and expectations of a free people than the laws of our own United States of America.

To escape the oppressive laws of their native lands our forefathers braved the dangers of a long and tedious journey across uncharted seas to establish a new and strange conception of the rights and dignity of the individual. In the beginning their efforts were crude and imperfect. They were too close to the old order to fully vision a wholly free haven, but from it came the ideal that men should be the master and not the slave of government. From the seed thus sown has grown the government under law as we know it in this country today. It has furnished an example which has had a beneficial influence in all parts of the universe.

To a certain degree the law students of this great university are the custodians of the best traditions of the most ancient of all professions. I believe you have the faith and courage to make the most of the opportunity to inculcate respect and obedience for law. As a layman I am confident the lessons learned here will be used wisely and with the good of the country as the ultimate goal. In a free nation the majesty of the law is the most precious thing we have.

As a person outside the legal profession I bring you these thoughts hopeful that they will arouse a better conception of the great interest of the ordinary citizen in the law as it affects his daily life. Those of you who are inside the precincts of the law have an unusual opportunity to help build a better understanding of its importance and benefits.

# Sentence of Mrs. Rebecca Peake

*Contributed by*
John J. Finn of the Barre (Vt.) Bar

ON DECEMBER 23, 1835, at Chelsea, Vermont, in the trial of Mrs. Rebecca Peake, charged with murder, the Jury retired and after an hour's deliberation brought in a verdict of GUILTY —when Judge Williams addressed the prisoner as follows:

"Rebecca Peake, The Grand Jury for this county have preferred against you a bill of indictment, charging you with the murder of Ephraim Peake. To the indictment you have plead not guilty. The jury after a calm, patient and full investigation, have found you guilty. The court are entirely satisfied with the verdict. Indeed, the jury could not from the evidence have come to a different conclusion. You thus stand convicted of the crime of wilful murder with premeditated malice. It remains for the court to perform the unpleasant and painful duty imposed on them, of pronouncing the sentence of the law, which must convey you to the gallows and send your spirit into the presence of your Almighty Judge, who knows every action of your life and every thought and intent of your heart. On this solemn and affecting occasion, it is neither necessary nor expedient that we should harass your feelings by an enumeration of all the circumstances which have transpired and been detailed in evidence which but too powerfully impresses the mind with the conviction of the enormity and the greatness and the peculiar malignity of your crime. We can have no other feelings in your present situation, than emotions of the most painful regret and sorrow.

"It appears that some years since, you married the father of the deceased, and on account of a dissatisfaction with the manner in which he made an arrangement of property, you conceived the desperate and detestable resolution of administering to him and his family a deadly and fatal poison, and you carried your resolution into effect so that you endangered the life of your husband, made his daughter a helpless cripple for life, and sent his son to an untimely grave. Instead of being the affectionate mother of his child as was your duty, you became his ruthless murderer. The law adjudges that such persons who evince so malignant a disposition and purpose, must not continue on the earth or be any longer the scourge and terror of their fellow beings. On

this subject we have no discretion, we can neither increase nor lessen the punishment awarded for the crime, but are compelled to pass the fatal sentence which will cut the thread of your existence here.

"It is not for us to say that the prerogative of pardon ought not or cannot be extended to you. The sceptre of mercy is swayed by other hands. We can only say that there is nothing in your case calculated to raise any hopes that this prerogative will be exercised in your behalf or that you will not undergo the sentence of the law. We can only advise you not to place any reliance on a hope of pardon, but spend the remainder of the time allotted to you in this world in preparing for your departure. Let me entreat you then, as a fellow immortal, that by deep contrition and repentance, you endeavour to secure an interest in the Saviour of sinners and through His intercession and merits to obtain the pardon of your sins. Guilty and criminal as you are, you may yet find mercy at the throne of Grace; but let me assure you, that unless you exercise this repentance and contrition; unless you are deeply penetrated with a sense of your crime and your sins and become penitent therefor, 'the throne of mercy will be inaccessible,' and 'the Saviour of the world,' as to you, 'will have been born in vain.'

"The sentence which the law awards and which the court pronounce, is, that you be taken from this bar to the prison from which you came, and there remain until Friday the twenty-sixth day of February next, and on that day at some place of execution, to be selected by the Sheriff, between the hours of ten o'clock in the forenoon and three in the afternoon, you be hanged by the neck until you are dead, and may Almighty God have mercy on your soul."

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The prisoner died in Chelsea jail, Feb. 8, of ulcers in the throat.

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"The law is the last result of human wisdom acting upon human experience for the benefit of the public."

—*Samuel Johnson*

### *Early Disillusionment*

An Oklahoma friend tells of a young lawyer down there who nearly gave up the idea of practicing law when his first problems were a young lady who wanted to be married; a married woman who wanted a divorce; and an old maid who didn't know what she wanted. Old lawyers can tell him of numerous clients who don't know what they want. Just seem to want to "talk to my lawyer."

# American Bar's Wealthiest Lawyer

By ELI GOLDSTON

*From Harvard Law Record*

JOHN W. STERLING is reputed to have earned more from the practice of law than any other attorney in the history of the American bar. Yet this legal Croesus only twice in his entire career appeared in court—both times in petty cases, one being a $500 assault and battery action. Unknown to the public and almost unknown to the bench and bar, his name is not even footnoted in legal history. On the door of a New York City law "factory" and on the cornerstone of a New Haven gothic building group, however, his name still challenges the eraser of time.

Born in 1844 the son of a sea captain, Sterling was scarcely the boy expected of such lineage. He detested water travel, never went abroad, and even avoided river ferry boats. He was an earnest, scholarly boy and never weighed so much as 150 pounds as a man. At Yale College he was Phi Bete, Skull and Bones, a debater, and winner of the declamation contest. His awards, however, left him insecure as to his abilities and ill-satisfied. He was extremely conscientious in his school tasks, and he worked long hours with abnormal zeal.

His diary of these days is filled with pious resolutions about not smoking, resisting temptation, working hard, etc. The youth clearly foreshadowed the later man—ascetic, preaching noble general sentiments but opposing relief work as the first step to state socialism, uncomfortable in the society of women, driven to long hours of labor by a remorseless subconscious need. Freudian psychiatry would explain this personality as based on his physical inability to emulate his father and on his subconscious attempt to overcompensate intellectually. His dislike of water would be explained as an expression of an "unresolved" father-son rivalry which is not uncommon. Thus can be understood the anxieties which drove John Sterling to amass his fortune and to make the magnificent gift for which, if anything, he will be remembered.

At Columbia Law School, Sterling continued his brilliant

scholastic record. He led his class and was quite perturbed that tradition didn't allow one man to be valedictorian and also to win the Law Prize. At law school he worked hard on moot court cases, and he even hired a lawyer to listen to his arguments and criticize them. By the middle of the semester he usually had read and reviewed the entire course reading assignment. The industry with which he attacked his work amazed his classmates.

### The Lawyer as a Young Clerk

During summer vacation Sterling had worked at a Utica law firm—where he introduced double entry bookkeeping and made the business side of the firm one of the most advanced in the state. After graduation he took a clerkship with David Dudley Field. David was a brother of Justice Stephen Field of *In re Neagle* (135 US 1) fame and also of cable-layer Cyrus W. Field. David D. Field wrote the 1848 N. Y. Code of Civil Procedure. Current seniors will be interested to learn that Sterling started his legal career unpaid and at the end of the first year finally reached $20 per week. He recorded in his diary that the clerks were "all treated as dogs or the most servile menials."

Field was counsel for Jay Gould and Jim Fiske. Sterling did the office work on the more than 100 suits resulting from their "Black Friday" attempt to corner gold, and he thereby won Gould's confidence. When Sterling in 1873 set up his own firm with Thomas G. Shearman, the new firm of Shearman and Sterling took over the "Black Friday" cases from Field's firm.

### The Law Office as a Gold Mine

Sterling's success in minimizing the legal consequences of "Black Friday" soon attracted many more clients of the type which has been described as "the ideal client—very rich and in very serious trouble." The Sterling firm defended Anaconda Copper Co. in a deluge of suits. They defended attempts to break the wills of the wealthy Osborn family. They had numerous legislative attempts to regulate rates of Consolidated Gas Company affiliates struck down as confiscatory and void. National City Bank of New York and the Bank of Montreal, financial titans of North America, were clients. James J. Hill and Lord Strathcona, promoters of American and Canadian railroad empires, came to him for advice. William Rockefeller, brother of John D., and James Stillman, powerful banker, followed his counsel. He was director of a long list of corporations, including the New York Edison.

Before Sterling's time, financial success at the bar had de-

pended on skill in trial and appellate advocacy. He was the first of the influential office lawyers, one of the first corporation lawyers. Captains of industry, financial magnates, promoters of national corporations, robber barons of the burgeoning turn-of-the-century capitalism sought him out. Once a month he led a task force of clerks into the bank vaults for an all-day session of coupon clipping for himself and clients. So shy that he never appeared in court, attended class reunions at his beloved Yale, or went to formal affairs, Sterling is reported to have dominated small conferences on business and law strategy. He is reputed to have settled as many important cases out of court as the Supreme Court decided.

With a roster of clients which read like the Dun and Bradstreet AAAA section, Sterling's practice was extremely lucrative. At the same time he lived a simple bachelor life. He remarked once that he desired to have so much money at his command that he could spend it like water if he cared to do so—and that he would never care to do so. He begrudged time off for lunch, and made his secretary eat in with him. He ordered his clothes by phone. From 8:00 A.M. to 6:30 P.M. he was at his desk. Every evening he worked in his home library or conferred with clients.

### THE LAWYER AS A BENEFACTOR

When Sterling died on July 5, 1918, the *N. Y. Times* ran a short formal notice listing a few of his directorships and some of his wealthy clients. When his will was filed the *Times* devoted columns just to listing his securities which went to Yale University as the residuary estate. When distributed the Yale legacy turned out to be nearly forty million dollars, again as much as the then Yale endowment. No speculator, Sterling piled up this entire fortune from his professional income as lawyer to business tycoons and executor and trustee of large estates.

Keith Lorenz, '15, in his biographical sketch (48 Law Notes 1, 1944) states that Sterling wished to leave a memorial to himself both by perpetuating the original name of his firm (and Shearman and Sterling remains today one of New York's largest law offices) and by having his portrait hang amongst the great men of Yale (and today it can be seen in Yale's Sterling Library). Ironically enough, the Yale Law School, which benefited so much from his gift, today is dedicated to a type of legal education aimed to prevent the production of more lawyers of his type—master jugglers of legal principles with no grander conception of the law than a business weapon and a means of livelihood.

# WHICH WAY?

BY HON. ROBERT G. SIMMONS
*Chief Justice of the Supreme Court of Nebraska*

Condensed from
South Dakota Bar Journal, October, 1947

IF ANYONE asks you, as I have been asked during the last months, what is the distinguishing difference between the American system of government and the totalitarian systems that still rule great areas of the world, my answer is, the distinguishing difference in the American system of government is an independent judiciary; a judiciary not subordinate to either legislative or executive; a judiciary that has power not only to decide as between citizens in their disputes, but a place where the citizen can go and where even the strong arm of the government itself may be stayed if there has been an invasion of the rights that man has under constitutional or statutory provisions. That is the American judiciary.

Life has not always been easy with the courts. Let me call your attention to just one sentence in England's great charter. King John promised that he would not deny justice; that he would not delay justice; that he would not sell justice. That only put the promise there. It did not make it so. It was long years, as you well know, before a small group of English judges had the courage to tell the King of England, "You cannot control our judgments; we are responsible to God and country for that which we decide." And from that came the independent judiciary we have inherited in America.

During this period of the growth of the common law there grew up also the common law procedures. There came the time when the common law judges were either unable or unwilling to change their forms, to expand the remedies to meet the needs of a growing community and a growing country. But the people would not be stayed. The equity system was devised, a system which possibly, if not probably, could have been avoided had the common law courts and the common law judges been able or willing to develop remedies and rules and rights in keeping with a developing civilization.

Let me make this distinction. The rules of substantive law, as

declared by the courts, those rules that stand the tests of time, do so because they meet the combined judgment of our society that they are right. When they do not, in the substantive law field, they are changed by the courts or legislatures. The rules of substantive law have grown and developed with the needs of the time.

Let's come on down to a relatively modern time, one about one hundred years ago. This discontent of the people with the old common law forms and the complexities of procedure found expression in New York in what we term the Field Code. It was a forward step to meet the needs in the adjective field. New York adopted it, and it came on west through our section, through Ohio, Michigan, Minnesota, to Iowa, and into Nebraska. It is now about one hundred years old.

A hundred years have produced changes in America, and a hundred years have produced demands on the part of the American people that we move forward in the modernizing of the machinery of the courts.

Now, what has happened? During this last half century in almost direct proportion to the increased feeling on the part of the peoples that the judiciary and the judicial department of government were not measuring up to their needs, we have witnessed the growth not only in the Federal Government but in the State governments of administrative tribunals, courts in effect, created to decide disputes between people that ought by every rule to be decided in the judicial department.

Why has this power been put in administrative agencies? I have not had occasion to examine your statutes in South Dakota, but let me refer to just two in Nebraska, for the same clause appears in both of them.

In our Workmen's Compensation Act, we have a court made up of one man representing industry, and one man representing the public. The court is directed in hearing matters coming before it to ignore rules of evidence and technical procedure enforced in the courts. The lawyers in legislative bodies have permitted that language to pass without challenge.

I had occasion but a few weeks ago to go through our Unemployment Insurance Act. The same clause was there. There were one, or two, or three paragraphs of what we might term substantive law, defining rights, and paragraph after paragraph of procedure. These things come about because people want to get away from the restrictive machinery of a judiciary system that has not been geared to modern needs.

Let's go on to one other thing. In the last generation there has grown up in America at least one agency, purely private in character, that holds itself out

to the public and to the business world, as being ready and able to furnish a conclusive determination of any dispute on any matter by arbitration. Not only are they saying to the people of Nebraska, and I assume to the people of South Dakota, that they have the machinery by which they can settle your disputes and keep entirely away from the courts, but they are asking people to write in their contracts a clause that if any question arises in the construction of contracts of long duration that the arbitration association shall decide it, and decide it finally.

Now note the impact of that sort of a thing upon the judicial department of government, upon the department of government that is designed to make effective the determination of disputes by law and to protect the rights of men. Here is an agency that in its creation has no relation with the people. Here is an agency that looks to no one representing the public for its authority, but is an agency privately created. Here is an agency that is telling the people, we have machinery which we have created which is better than the judicial department; we will decide matters by rules of procedure which we devise, and we will decide them by rules of substantive law known only to the arbitrator from whose decision there is no appeal.

It is a challenge. We can make the judiciary strong. We can restore it to its place and function in the American system if we will. I say "we" because I would call your attention to something else that should be a matter of great pride to us. But with this matter of pride comes a sense of the responsibility that it entails.

Members of our profession have served both state and nation in the position of chief executive, yet the executive department is not limited to members of the Bar. Members of our profession have served with distinction in legislative bodies, state and national, yet legislative bodies are not limited to the profession of the law. But here is one of the three great departments of government, the judicial department, that is manned and guided, staffed, led, and inspired solely by one profession, and one profession alone, and that is the profession of the law.

One of the great departments of government depends upon the American lawyer if it is to function. We can make it function. We can bring our procedures and our rules of evidence and the things by which we administer justice to the point where they meet the needs of the American people, to where the people will instinctively turn, as did our ancestors, and say, here is the place where we can go and secure justice. We can do it if we will.

# The Cold Neutrality of an Impartial Judge

By HON. BERNARD L. SHIENTAG

*Justice of the Appellate Division of the Supreme Court, First Department, New York City* • Condensed from New York State Bar Association Bulletin, December, 1947

WHAT do the litigant and his lawyer have the right to expect of the judge? They have no right to expect him to be a mere complaisant automaton. A lawsuit is not a game. It has some of the elements of a contest but, primarily, it represents an earnest endeavor to arrive at the truth and the justice of a controversy. The judge maintains order and decorum and he must do so with a firm hand. He sees that the rules of evidence and of procedure are followed. It is his duty to protect witnesses from being abused or browbeaten or ill-treated by counsel. Thomas Fuller put it so quaintly, but forcefully, three centuries ago when he said, "If any shall browbeat a pregnant witness on purpose to make his proof miscarry, he (the judge) checketh them and helps the witness that labours in his delivery. On the other side he nips those lawyers who under a pretense of kindness to lend a witness some words, give him new matter, yea clear contrary to what he intended." Under my conception of the province of a trial judge, he will not allow a cause to fail because of a technical defect in proof which can readily be supplied if known, or because of the inability of counsel to ask a vital question in proper form.

Apart from the foregoing, and generally speaking, the conduct of the trial should be left in the hands of the attorneys for the respective parties. A litigant has the right to expect that the judge will permit his lawyer, within all reasonable limits, to try his case in his own way; that the judge will not interfere in the examination of witnesses, even though he believes he can do a better job than counsel, except to correct patent errors, misconceptions or misrepresentations; that he "meets not the testimony half way but stays till it come at him;" that he will be courteous and considerate to the parties, their attorneys and their witnesses; that he will be patient even though he thinks the case could be tried in half the time counsel takes; that he will make no interlocutory comments on the strength or weakness of a case, whether relating to the law or the testimony—comments

which have no significance to the judge and no bearing on the ultimate decision, but which are regarded by the parties and their lawyers as instinct with purposeful meaning and as indicating that the judge no longer has an open mind on the issues involved.

The litigant and his lawyer have the right to expect that the judge will avail himself of some opportunity for reflection before deciding a case if he is trying it without a jury, but that he will not unduly delay his decision; and that if the case is tried with a jury, he will deliver a fair, dispassionate charge, which will clearly outline the issues, without conveying to the jury in any way or manner his views on the merits.

Many laymen and lawyers have the old time instinctive distrust of the one-judge court as trier of the facts. While I believe that the well-trained judge has a high degree of objectivity, my own experience has convinced me of the value of the jury in civil cases under our present system. Just as different people who see the same occurrence differ honestly about what happened, so different judges may draw different conclusions about the facts in a case from the testimony presented. As between the jury and the single judge, for the trial of the facts, I am unhesitatingly for the jury. The ideal system would be to have a three-judge court to try

all civil cases in the Supreme Court, at law and even in equity except that the right to trial by jury should be preserved in actions for defamation, assault, false arrest and imprisonment, malicious prosecution and probably divorce. I presented this view some years ago in the Cardozo Lecture on "The Personality of the Judge."

I realize that a three-judge trial court may not be practical except in a limited type of cases in large cities. I like to envisage, for example, after calendar congestion has been relieved, a branch of the Supreme Court to be known as the Commercial Term, composed of three judges, offering businessmen an immediate trial of their controversies and the setting up of a three-judge court for the trial of complicated equity causes such as derivative stockholders' suits. We have the beginnings of a three-judge court in the federal statutory court, which seems to be working quite well and we should be willing to experiment with it in the state courts.

The verdict of a jury is not as sacrosanct here as it appears to be in England. Moreover, our Appellate Courts purport to give the same weight to the finding of a single judge as they do to the finding of a jury. There has, however, been an impression that Appellate Courts in actual practice are less prone to interfere with the verdict of a jury than with the decision of a single judge on the facts.

What we do expect, at least what we hope for, is that a defeated litigant, however dissatisfied with the decision, will feel that he has been given a patient, courteous hearing and a fair trial. There may be some who have the weakness to imagine that everyone who differs from them is both intellectually inferior and morally deficient. Those benighted individuals can only be set straight, if at all, by their lawyers. A judge's reputa-

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tion is not in his own keeping. It is largely in the hands of those most familiar with his work: his brethren at Bar, whose solemn responsibility it is, and who have always shown themselves zealous, to protect the good name of an honorable judge.

We have the right to hope that the Bar will say of us what was once said of a distinguished English judge: "We have occasionally differed from opinions laid down by Sir Thomas Denman, since he came into office, but when we thought him in error we have regretted it rather as an instance of the fallibility of human judgment than as any proof of a conscious deviation from admitted principle."




*"I swear to tell the truth, the whole truth, and nothing like the truth."*

My recent designation to the Appellate Division of the Supreme Court, First Department, brings to a close twenty-three years of service in the civil trial courts. If I had to start all over again as a trial judge, while I am no great believer in aphorisms, I should lay down, for myself, the following rules:

1. Treat each case, no matter how trivial it may seem to you, as if it were the most important case you had to try. That is the way a litigant feels about his case.

2. It is better to lose time than to lose patience.

3. There is a time to speak and a time to be silent. In general, the silent judge makes the better judge, at least in the estimation of the litigants and their lawyers. Like the good fishermen, the judge must "study to be quiet." A judge seldom regrets what he failed to say during a trial but, oh, how often he regrets and wishes he could recall some of the things he did say!

4. Ridicule, coming from a judge, is intolerable. Sincerity is no excuse for wounding *l'amour propre* of any participant in a trial. No one admires the judge who, regardless of his intentions, hurts or embarrasses a lawyer or a witness during a trial. "Rudeness ruffles, courtesy calms."

5. Be especially on your guard when you have been overdriven or overfatigued or when you have been subjected to annoyance and irritation. Keep the spectre of "displaced aggression" before you.

6. Finally—and "it is this, it is this that oppresses my soul, it is this, it is this that I dread" —use all possible restraint to avoid making interlocutory comments about a case, however well intentioned.

Splendid rules! But if I started all over again, I should probably find myself violating them now and then as alas, I have done in the past. For the flesh is weak and the provocation sometimes is very great. But these rules are goals for which to strive and the very striving carries with it a certain measure of attainment.

Ye shall do no unrighteousness in judgment. Ye shall not respect persons in judgment, but ye shall hear the small as well as the great; ye shall not be afraid of man for the judgment is God's.

Earnestly do we strive to obey these Divine injunctions; and happy indeed are we, if in our hearts we can feel that our efforts have not been altogether in vain.

# LAW EXAMINATIONS IN NEW ZEALAND

By WILLIAM REED EDGE
*Barrister and Solicitor of Auckland, New Zealand*

THE law examinations here are conducted by the University of New Zealand which is only an administrative, not a teaching organization. There are four general colleges, at Auckland, Wellington, Christchurch and Dunedin. In addition, there are two agricultural colleges. There is only a slight difference in the examination for barristers and that for solicitors. Solicitors have to pass in

DIVISION I.
1. Latin or English or Philosophy
2. Jurisprudence
3. Constitutional History of Law

DIVISION II.
1. The Law of Property
2. The Law of Contract

DIVISION III.
1. The Law of Torts
2. Criminal Law
3. Company Law and The Law of Bankruptcy
4. The Law of Trusts, Vices, Intestate Succession, and The Administration of Estates of Deceased Persons

DIVISION IV.
1. Law of Evidence
2. Practice and Procedure
3. Conflict of Laws, also Conveyancing and Bookkeeping

The barrister's examination in DIVISION I includes Latin, and English or Philosophy besides Jurisprudence and Constitutional History. In DIVISION II Roman Law is added, and in DIVISION IV International Law is added.

Barristers and solicitors are admitted by the Supreme Court of New Zealand, and a barrister has audience in any of its courts including the Court of Appeal. A solicitor may practice in the lower courts, e.g. Police Court, Magistrates' Court, Mining Courts, and he may appear in Chambers in the Supreme Court, e.g. in bankruptcy matters, but he cannot conduct cases in the Supreme Court. The distinction is, I think, something like that made by you between Counsellor and Attorney. It is rather curious that in England and here the use of the word "attorney" has been dropped in the sense of a legal practitioner. In New South Wales the word "attorney" used to be applied to solicitors, but I do not know whether this use is retained.

# HELP WANTED

*ANONYMOUS*

... Contributed by JOHN B. McCALLUM

*of the Atlanta, Georgia, Bar -:- From The Law Society Journal, August, 1947*

A Law Firm commanding
Position of standing
Requires a general clerk—
A man who's admitted
To practice, and fitted
To handle diversified work

Must know the proceedings
Relating to pleadings,
The ways of preparing a brief;
Must argue with unction
For writs of injunction
As well as for legal relief

Must form corporations
And hold consultations
Assuming a dignified mien;
Should reach each decision
And legal provision
Wherever the same may be seen.

Must analyze cases
And get at their basis
Should never be idle or slow;
Must manifest learning
In all things concerning
The matters referred to below:

Attachments and trials,
Specific denials,
Demurrers, replies and complaints,
Disbursements, expenses
And partial defenses,
Ejectments, replevins, distraints;

Estoppels, restrictions,
Constructive evictions,
Agreements implied and express,
Accountings, partitions,
Estates and commissions,
Incumbrances, fraud and duress.

Above are essentials,
The best of credentials
Required — and handsome physique;
Make prompt applications
Will pay compensation
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